

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN T. MELI, JR.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09C-09-108 WCC
)	
REMBRANDT IP)	
MANAGEMENT, LLC, a)	
Delaware limited liability company)	
and ERIC BROOKS,)	
)	
Defendants.)	

Submitted: March 11, 2010
Decided: June 28, 2010

OPINION

On Defendants' Motion to Dismiss for Improper Venue - GRANTED

Joseph C. Schoell, Esquire; Kathleen M. Jennings, Esquire; Drinker Biddle & Reath LLP, 1100 N. Market Street, Suite 1000, Wilmington, DE 19801;
Kevin M. Baird, Esquire; Baird Mandalas LLC, 103 S. Bradford Street, Dover, DE 19904. Counsel for Plaintiff.

Sean J. Bellew, Esquire; David A. Felice, Esquire; Ballard Spahr Andrews & Ingersoll, LLP, 919 N. Market Street, 12th Floor, Wilmington, DE 19801. Counsel for Defendants.

CARPENTER, J.

Before the Court is Defendant Rembrandt IP Management, LLC (“Rembrandt”) and Defendant Eric Brooks’s (“Brooks”) Motion to Dismiss for Improper Venue. Plaintiff John T. Meli (the “Plaintiff”) filed a complaint against Rembrandt and Brooks (the “Defendants”) alleging (1) violation of the Delaware Whistleblowers’ Protection Act and (2) violation of the Wage Payment and Collection Act of the State of Delaware. For the reasons set forth below, this Court hereby grants the Motion to Dismiss for Improper Venue as to both claims.

Facts

On January 3, 2006, Plaintiff entered into a written employment agreement (“Employment Agreement”) with Rembrandt to serve as the Executive Vice President and General Counsel for Rembrandt from January 1, 2006 to December 31, 2008. This was the second employment agreement entered into between the parties. On December 31, 2008, Plaintiff’s contract was not renewed.

Paragraph 17 of the Employment Agreement provides that “all actions and proceedings” between Plaintiff and Rembrandt shall be brought exclusively in the state or federal courts in Pennsylvania. It states:

This Agreement and questions relating to its validity, interpretation, performance and enforcement shall be governed and construed according to the laws of the Commonwealth of Pennsylvania. Employee and the Company submit to the exclusive jurisdiction of the state courts located in Montgomery County, Pennsylvania and to the Federal courts

located in Philadelphia, Pennsylvania as to all actions and proceedings relating in any way to this Agreement and/or Employee's relationship with the Company. Employee and the Company further agree that such courts shall have personal jurisdiction over each of them and are proper venue and a convenient forum with respect to all such actions or proceedings.

The Plaintiff is a lawyer licensed to practice in the State of Delaware but who resides in Montgomery County, Pennsylvania. Rembrandt is a Delaware limited liability company also headquartered in Montgomery County, Pennsylvania. Rembrandt manages entities that are in the business of patent right enforcement. The company provides legal and other services to those entities and to patent owners to assist them in identifying and evaluating patent rights for the purpose of asserting those claims and bringing lawsuits for alleged patent infringements. The company also manages a series of portfolio companies which are used to enforce various patents and to prosecute patent claims. Revenue generated from the activities of these companies would flow to the Rembrandt IP Fund, LLP (the "Fund") which was also managed by the principal company. Defendant Brooks was a principal investor in Rembrandt and played an active role in the Fund. It is the management of this Fund which the Plaintiff believes was improper and illegal and in which the dispute between he and Brooks led to the non-renewal of his contract and the filing of this litigation.

Standard of Review

The Court may dismiss a motion prior to discovery if the plaintiff cannot make out a *prima facie* case in support of its position based on the submitted documents.¹ When considering forum selection clauses, Delaware courts have adopted the U.S. Supreme Court approach in *M/S Bremen v. Zapata Off-Shore Co.*² Thus, the general rule is that where a forum selection clause within a contract is freely negotiated between the parties, the court should decline to proceed, even when venue where the suit is filed is proper.³ Forum selection clauses are *prima facie* valid and should be enforced unless the clause is shown by the resisting party to be unreasonable under the circumstances.⁴

Delaware courts have held that these clauses do not violate due process if they are the product of a freely negotiated agreement and are not “unreasonable and unjust.”⁵ By requiring a showing of unreasonableness, a heavy burden is placed on the plaintiff⁶ and a showing of mere inconvenience is not sufficient.⁷ There must be a showing that trial in the contractual forum “will be so gravely difficult and

¹ *Healthtrio, Inc. v. Margules*, 2007 WL 544156, at *2 (Del. Super. Jan. 16, 2007) (citing *Simon v. Navellier Series Fund*, 2000 WL 159780, at *6 (Del. Ch. Oct. 19, 2000)).

² 407 U.S. 1 (1972); *see also Margules*, 2007 WL 544156, at *3 (citing *Chaplake Holding, Ltd. v. Chrysler Corp.*, 1995 WL 653510, at *6 (Del. Super. Aug. 11, 1995)).

³ *Id.* (citing *Eisenmann Corp. v. Gen. Motors Corp.*, 2000 WL 140781, at *7 (Del. Super. Jan. 28, 2000)).

⁴ *Id.*

⁵ *Id.* (citing *Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 987 (Del. Super. 2000)).

⁶ *Margules*, 2007 WL 544156, at *3.

⁷ *Id.*

inconvenient that he will for all practical purposes be deprived of his day in court”⁸ or would seriously impair his ability to pursue the cause of action.⁹

Discussion

To properly assess this claim it is important to first put this dispute into its proper context. The complaint in this case asserts that in the Fall/Winter of 2005, Paul Schneck (“Schneck”) who was president of Rembrandt and Plaintiff began renegotiating a new employment contract for Plaintiff since the previous contract was due to expire on December 31, 2006. Negotiations subsequently led to Plaintiff agreeing to a new two-year contract and the Plaintiff asserts that as part of the negotiated terms, the corporation would agree to provide him with six months notice if they did not intend to renew the contract. The newly negotiated contract was accepted by the parties on January 3, 2006 but interestingly there is no reference to the six month notice provision nor any reference to a severance package for the Plaintiff.

In November of 2008, Schneck told the Plaintiff that his contract was not being renewed and on December 31, 2008, the ending date of the contract, Plaintiff’s employment was terminated. Since there is no allegation otherwise, it appears that the salary of the Plaintiff was paid by the Defendant through the end of his contract. What the Plaintiff is now attempting to enforce as a violation of the Wage Payment

⁸ *M/S Bremen*, 407 U.S. at 18.

⁹ *Eisenmann Corp.*, 2000 WL 140781, at *7.

and Collection Act is an agreement to provide the Plaintiff three months of “separation pay” which was allegedly agreed to by the Defendant since the six months notice of an intent not to renew his contract had not been provided to him. There is no written record of such agreement and it appears the original “severance” agreement and a subsequent modification that occurred were all done orally. It also appears that the Defendant was willing to pay the separation pay but wanted the Plaintiff to sign a release which the Plaintiff refused to agree to.

The Employment Agreement also required the Defendant to pay the Plaintiff what the contract referred to as “phantom” interest. This was a complex compensation provision relating to distributions made by the Fund to its limited partners of which the Plaintiff was one.

Plaintiff alleges that Rembrandt and Brooks violated the (A) Delaware Whistleblowers’ Protection Act and (B) Wage and Payment Collection Act because the Plaintiff refused to participate in certain actions in relation to managing the Fund. Plaintiff believed that certain actions were being done by Brooks and Schneck that were “materially inconsistent with, and a serious deviation from, financial management or accounting standards implemented pursuant to the Internal Revenue Code to protect persons from fraud and deceit.”¹⁰

¹⁰ Compl. ¶ 11.

It is the context of the dispute set forth above that the Court will now consider the motions filed by the Defendant.

A. Wage Payment and Collection Act of the State of Delaware

Plaintiff alleges that Rembrandt violated 19 *Del. C.* §§ 1102, 1103, 1104 of the Wage Payment and Collection Act of the State of Delaware by refusing to honor an oral contract regarding Plaintiff's separation pay and the Employment Agreement regarding Phantom Interest. The Court will first address the oral contract.

Plaintiff contends that after he was given notice that a successor employment agreement would not be offered, he claims to have reminded Schneck of a verbal statement made by Brooks that at least six months notice would be provided if Rembrandt was not going to renew Plaintiff's employment agreement.¹¹ Although Schneck responded that he did not remember such a statement,¹² the next day, he approached Plaintiff and asked Plaintiff if he would be willing to split the difference and accept three months of separation pay.¹³ Plaintiff agreed and the two men shook hands on that agreement (the "First Oral Contract").¹⁴

The following day, Schneck approached Plaintiff again and asked him if he would be willing to accept the three months of separation payable in January 2009,

¹¹ Compl. ¶ 69, 71.

¹² Compl. ¶ 70.

¹³ Compl. ¶ 72.

¹⁴ *Id.*

February 2009, and March 2009.¹⁵ Schneck also asked Plaintiff if he would agree to waive receipt of further separation pay in the event Plaintiff obtained subsequent professional employment prior to March 31, 2009.¹⁶ Plaintiff agreed to both of these terms, and the men again shook hands on that agreement (the “Second Oral Contract”).¹⁷ Both oral contracts were separate agreements from the original Employment Agreement.¹⁸

In order to invoke the Wage Payment and Collection Act, the parties must meet the definitional requirements set forth under 19 *Del. C.* §1101. Plaintiff alleges that he meets the definition of “employee” under 19 *Del. C.* §1101(a)(3), which states: “[e]mployee’ means any person suffered or permitted to work by an employer under a contract of employment either made in Delaware or to be performed wholly or partly therein.”

When reviewing the facts in a light most favorable to the Plaintiff, the Court cannot find that the Plaintiff meets the Wage Payment and Collection Act definition of “employee” under the contract entered into. The Complaint does not indicate that the Oral Contracts were either made in Delaware or were for work to be performed wholly or partly therein. Furthermore, under the Contracts, no work was to be performed, the terms of the contract simply resolved the dispute as to the separation

¹⁵ Compl. ¶ 73.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Plaintiff concedes this point. *See* Pl.’s Resp. Mot. ¶ 12.

pay.¹⁹ Therefore, the Wage Payment and Collection Act is not applicable to the Oral Contracts entered into by the parties, because Plaintiff cannot satisfy the definition of “employee” under 19 *Del. C.* § 1101(a)(3) and the Courts have consistently held that severance pay is not covered by the Act.²⁰

Plaintiff also alleges that Rembrandt deprived him of Phantom Interest agreed to in the Employment Agreement. Again, Plaintiff argues that despite the forum selection clause, Delaware is the correct venue to bring forth such a claim because 19 *Del. C.* § 1110 states: “[e]xcept as provided in this chapter, no provision of this chapter may in any way be contravened or set aside by private agreement.” However, a review of the Employment Agreement reveals that it does not mandate that the provisions of the Act are not applicable to the employment relationship between the parties nor does it in any way prevent an enforcement of the purpose of the statute.

Title 19 *Del. C.* § 1113(a) goes on to further state: “[a] civil action to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction.” In spite of the Plaintiff’s efforts to characterize the Plaintiff’s work to include some oversight of litigation here in Delaware, this was compensation paid to a Pennsylvania resident by a company headquartered in Pennsylvania. It is that jurisdiction that should resolve the dispute and not the Delaware courts and § 1113 would allow this employment dispute to be resolved in the agreed upon venue.

¹⁹ Pl.’s Resp. Mot. ¶ 12.

²⁰ See *Commons v. Green Giant Co.*, 394 A.2d 753 (Del. Super. 1978).

In light of the above and the fact that Plaintiff has filed litigation relating to this employment relationship in Pennsylvania courts, the Court finds that the Plaintiff has not met its burden of establishing that the forum selection clause set forth in their agreement should not be enforced.²¹ The Pennsylvania courts can provide an adequate remedy to this dispute, and as such, the Court grants the Defendants' motion as to this claim.

B. Delaware Whistleblowers' Protection Act

Plaintiff next alleges that Rembrandt violated the Delaware Whistleblowers' Protection Act when Plaintiff refused to assist Brooks and Rembrandt in the commission of a violation of the Internal Revenue Code.²² Plaintiff contends that despite the forum selection clause within the Employment Agreement, Plaintiff's claim must be heard in Delaware because Pennsylvania provides no recourse for whistleblower actions against private employers, Pennsylvania courts cannot enforce Delaware's Whistleblower Act, and a federal court action is not possible.

Although the Court would generally defer to the forum selection clause when the terms are freely negotiated, as they are here²³, the issue is complicated based on Plaintiff's contentions that Pennsylvania fails to provide protection for whistleblowing

²¹ Judicial efficiency would also clearly be served by requiring all litigation over this employment relationship to proceed in a single jurisdiction.

²² Compl. ¶ 50.

²³ See Compl. ¶ 57. It is uncontested that the parties entered into two employment agreements and that each agreement was fully negotiated with a choice of forum clause indicating Pennsylvania law and forum within Montgomery County, PA.

relating to private employees. Thus, the Court must examine Plaintiff's claim and whether the forum clause violates due process by being "unreasonable and unjust."²⁴ As previously noted, the Plaintiff bears the burden of convincing the Court that enforcement of the venue selection clause would for all practical purposes deprive Plaintiff of his day in court²⁵ or would seriously impair Plaintiff's ability to pursue his cause of action²⁶.

Before considering the merits of the motion regarding the claim, the Court must express that it has significant concerns whether the actions of the Defendant violated Delaware's Whistleblowers Act. The protection set forth in 19 *Del. C.* § 1703 prohibit an employer from discharging, threatening or otherwise discriminating against an employee regarding their compensation, terms, conditions, location or privileges of employment. Here there is no dispute that the Plaintiff worked throughout the term of his employment contract and was paid his salary. The complaint alleges no improper conduct regarding the employment relationship other than the assertion that Plaintiff was a good employee, with whom the Defendant appeared to be satisfied with his work product and in spite of this, they failed to renew his contract. The difficulty with the Plaintiff's argument is that as of December 31, 2008 when his contract ended, his rights and privileges to that employment also ended. In addition,

²⁴ *Hornberger Mgmt. Co.*, 768 A.2d at 987.

²⁵ *M/S Bremen*, 407 U.S. at 18.

²⁶ *Eisenmann Corp.*, 2000 WL 140781, at *7.

with regard to the relief and damages available in 19 *Del. C.* § 1704(d), Plaintiff either has already received or clearly is not entitled to most of the available compensation since the terms of his employment contract have concluded. If the Defendant had terminated his employment prior to the end of his contract and the Plaintiff could establish the cause was his whistleblower conduct, then perhaps a cause of action would arise. However, these are not the facts here and there is no allegation that clearly reflects a threat or discrimination.

However, the Court has not been asked to address the merits of the Plaintiff's claim but is simply asked to decide whether it should be brought in Delaware or Pennsylvania. The Court agrees that generally Pennsylvania does not provide a cause of action against private employers for termination of an employment relationship under their whistleblower law. However, Pennsylvania courts have heard whistleblowing conduct against private employers under a wrongful termination action when the discharge of the employee threatens clear mandates of public policy. A Pennsylvania court noted the source of "public policy" in which a private employer's right of discharge might be limited:

The sources of public policy... include legislation; administrative rules, regulation, or decision; and judicial decision. In certain instances, a professional code of ethics may contain an express of public policy... Absent legislation, the judiciary must define the cause of action in case-by-case determinations.²⁷

²⁷ *Krajsa v. Keypunch, Inc.*, 622 A.2d 355, 358-9 (1993) (citing *Cisco v. United Parcel Serv., Inc.* 476 A.2d 1240, 1243 (1984)).

Based on our facts and this definition of “public policy,” the Court finds that the Plaintiff has failed to provide a showing that Pennsylvania courts would not recognize his whistleblowing claim under the public policy exception based on either (or both) his professional rules of conduct as an attorney or the alleged violation of the Internal Revenue Code. Both of these codes appear to have the potential to invoke the public policy exception in which Plaintiff can thus have his whistleblowing claim heard before a Pennsylvania court. While the Court agrees that the claim could not be brought directly under the Pennsylvania whistleblower statute and he may encounter similar obstacles to its merits as the Court noted earlier, an alleged wrongful termination complaint based upon that same conduct may provide a recourse to address this issue.²⁸

In order for the Court to find a contractual venue selection clause unreasonable, it was essential for the Plaintiff to provide the Court with proof that his claim would not stand before a Pennsylvania court. While perhaps not in the exact format that the Plaintiff desires, there does appear to be a mechanism available to the Plaintiff to address the misconduct he has alleged in his Delaware complaint. As such, the Court will not disturb the freely negotiated forum selection clause and will grant Defendants’ motion.

²⁸ While the Court recognizes that the prior Pennsylvania decisions regarding the Whistleblower statute and the public policy exceptions were in the context of at-will employment, it believes they provide a basis to make a similar argument for contractual employees as the same public policy interest exists in either context.

Conclusion

For the reasons set forth above, this Court hereby GRANTS Defendants' Motion to Dismiss for Improper Venue as to both claims.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.